BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFERY C. NAVINSKEY	)	
Claimant	)	
VS.	)	
	)	
ADVANCED PROTECTIVE COATING and	)	
PERFORMANCE CONTRACTING GROUP	)	Docket No. 1,061,603
Respondents	)	
AND	)	
	)	
EMCASCO INSURANCE COMPANY and	)	
ARCH INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Respondent Advanced Protective Coating and its insurance carrier, Emcasco Insurance Company, appealed the September 27, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Carl Mueller of Kansas City, Missouri, appeared for claimant. Denise E. Tomasic of Kansas City, Kansas, appeared for respondent Advanced Protective Coating (Advanced) and its insurance carrier, Emcasco Insurance Company (Emcasco). Brian J. Fowler of Kansas City, Missouri, appeared for respondent Performance Contracting Group (Performance) and its insurance carrier, Arch Insurance Company (Arch).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 26, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant began working for Advanced Protective Coating in 2007. On June 4, 2012, Performance Contracting Group purchased Advanced. Claimant began working for Performance on the day it purchased Advanced. In an application for hearing filed on July 18, 2012, claimant asserted that he sustained right and left upper extremity and body

as a whole injuries by repetitive trauma from July 1, 2007, through June 11, 2012. Claimant filed an amended application for hearing on July 26, 2012, alleging the date of injury as March 1, 2012, through June 11, 2012. In both the application and amended application for hearing, claimant listed Advanced and Performance as employers.

ALJ Hursh determined that claimant's date of injury by repetitive trauma was June 2, 2012, the date claimant last worked for Advanced. ALJ Hursh found claimant's four-plus years of repetitive trauma while working for Advanced was the prevailing factor causing claimant's injury. He specifically found that claimant's brief repetitive trauma while working for Performance was not the prevailing factor causing claimant's injury. ALJ Hursh then ordered Advanced and its insurance carrier to designate a treating physician for claimant.

On June 11, 2012, claimant sought treatment from his family physician for his bilateral upper extremity complaints. Claimant's family physician ordered NCV and EMG studies, which were performed on June 11, 2012. The studies revealed right carpal tunnel syndrome, bilateral bicipital tendinitis and bilateral lateral epicondylitis. Claimant was provided a diagnosis of his condition by his physician and told the upper extremity conditions were work related.

Performance made arrangements for claimant to see a physician at Concentra on June 13, 2012. The physician at Concentra gave claimant work restrictions. Advanced asserts claimant's date of injury by repetitive trauma was on June 11, 2012, or in the alternative on June 13, 2012. It then argues that if claimant's date of injury by repetitive trauma was June 11 or 13, then claimant failed to give "proper"[1] notice required by K.S.A. 2011 Supp. 44-520. Advanced also asserts that claimant's work activities at Advanced were not the prevailing factor causing claimant's injuries or current need for medical treatment.

Performance and claimant ask the Board to affirm ALJ Hursh's findings.

The issues are:

1. What is claimant's date of injuries by repetitive trauma?

2. Did claimant sustain injuries by repetitive trauma arising out of and in the course of his employment with Advanced or Performance?

3. If claimant sustained injuries by repetitive trauma arising out of and in the course of his employment with Advanced, did claimant give timely notice?

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[1] Advanced Brief at 4 (filed Oct. 17, 2012).

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

At the preliminary hearing, the parties stipulated that claimant's "accident date" was June 11, 2012. Presumably, the parties meant claimant's date of injuries by repetitive trauma was June 11, 2012. This agreement could only apply to Performance as claimant did not work for Advanced on that date. The parties also stipulated that claimant worked for Advanced until June 4, 2012, and began working for Performance beginning June 4, 2012. In their closing arguments at the preliminary hearing, none of the parties argued that the date of injury by repetitive trauma was June 2, 2012. However, Performance did argue that the prevailing factor causing claimant's injuries was the work claimant performed at Advanced.

At the preliminary hearing, claimant testified that he has been a painter for 19 years. In 1997, while working for DeLong Industrial, claimant filed a workers compensation claim because of bilateral wrist injuries. Claimant had some right wrist pain, but no right wrist surgery. He did have left wrist surgery and received a settlement based upon a 10% functional impairment of the left wrist.

Claimant worked as an industrial painter for Advanced from July 1, 2007, through June 3, 2012. Performance bought Advanced on June 4, 2012. Claimant went through a new hiring process and was hired by Performance and began working for Performance on June 4, 2012. Claimant performed the same job duties for Performance that he performed for Advanced for the same rate of pay. He worked in the same shop, had the same boss and the same home office.

In February 2012, claimant remodeled his home bathroom. He gutted the bathroom, framed it and installed new sheetrock. He installed new plumbing and performed electrical work. Claimant used a hammer, nail gun, screw gun and other hand tools.

During the 90 days prior to June 11, 2012, claimant had been working at Itan power plant and Bayer plant, six days a week, 11 hours a day. At Itan, claimant would climb up to where he was painting, carrying his equipment, and paint his way down. Claimant would also sandblast. The job was very physical and required claimant to use his arms repetitively. In April 2012, claimant began experiencing pain in his arms and shoulders. In April 2012, while working at the Itan facility, claimant mentioned having arm problems to Mr. Emmett, who was apparently claimant's supervisor. Claimant indicated that in April 2012, he would have to switch hands while driving and discontinued lifting weights because of the pain. Claimant testified that on June 3, 2012, he was still having issues with his hands. On June 13, 2012, claimant completed an employee's statement, which indicated

claimant had reported his injuries on April 1, 2012, but left the section blank that asked whom he notified.

All of claimant's medical records related to his upper extremities were lumped into one exhibit at the preliminary hearing, with the exception of the report of Dr. James A. Stuckmeyer. Many of those medical records were duplicative and some are not relevant to this claim. Claimant's Exhibit 2 includes four copies of Dr. V. Nanda Kumar's June 11, 2012, notes and what appears to be sleep apnea test results.

On June 11, 2012, claimant went to see his family physician, Dr. Randy S. Buckles. At Dr. Buckles' clinic, claimant was examined by nurse practitioner Amy A. Tally. Her notes state claimant reported pain in both arms from the shoulder down. Claimant's upper extremities were injected with steroids and he was prescribed naproxen sodium. Claimant was referred to a Dr. V. Nanda Kumar, a physical medicine and rehabilitation physician, for NCV and EMG studies.

Dr. Kumar conducted the NCV and EMG studies the same day. The studies showed claimant had right carpal tunnel syndrome, bilateral bicipital tendinitis, left worse than the right, and bilateral lateral epicondylitis, left worse than the right. Dr. Kumar's notes indicated all three conditions were most likely work related. Dr. Kumar commented that claimant should have a right carpal tunnel release and left shoulder and lateral epicondylar area trigger point injections. Claimant reported his prior left carpal tunnel surgery to Ms. Tally and Dr. Kumar. Neither Ms. Tally nor Dr. Kumar gave claimant any restrictions.

Claimant returned to work the next day, June 12, 2012, and reported the work-related injuries to his employer, Performance. Performance sent claimant on June 13, 2012, to Concentra, where he was seen by Dr. Temesgen Wakwaya. Dr. Wakwaya's assessments were bilateral bicipital tenosynovitis, shoulder pain, shoulder strain, lateral epicondylitis, elbow tenosynovitis and right carpal tunnel syndrome. On June 13, 2012, claimant was given restrictions by Dr. Wakwaya. Claimant returned to work for Performance on June 14, 2012. He was placed on light duty and was working for Performance at the time of the preliminary hearing.

On July 5, 2012, Concentra expanded claimant's restrictions to pushing and pulling no more than 20 pounds, lifting no more than 15 pounds, and no bending. Claimant was treated conservatively at Concentra, including physical therapy and injections until July 12, 2012. On that date, Dr. Ronda L. Warren at Concentra referred claimant to an orthopedic specialist, Dr. Steven Smith, who diagnosed claimant with right carpal tunnel syndrome. He recommended carpal tunnel surgery for claimant, which has not been provided.

At the request of his attorney, claimant was evaluated on September 7, 2012, by Dr. James A. Stuckmeyer, an orthopedic surgeon. His opinion was:

> In summary, I feel within a reasonable degree of medical certainty that as a direct, proximate, and prevailing factor of the repetitive nature of the occupational duties required upon Mr. Navinskey while employed with APC [Advanced], he did develop the following orthopedic conditions: Bilateral internal derangements of the shoulder and impingement syndrome with possible rotator cuff pathology and possible glenoid labral pathology, along with bicipital tendinitis.[2]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-508(e) states:

> "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.

Claimant was employed by Advanced through June 3, 2012. The last day claimant actually worked for Advanced was on June 2, 2012. Claimant seeks benefits from both Advanced and Performance. Under K.S.A. 2011 Supp. 44-508(e), claimant's earliest date of injury by repetitive trauma at Advanced was June 2, 2012, the last day claimant worked for Advanced.

Claimant's date of injury by repetitive trauma at Performance was June 13, 2012, the date claimant was placed on modified duty as a result of his diagnosed repetitive

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[2] P.H. Trans., Cl. Ex.1 at 4.

trauma. That is the earliest of the four triggering events set out in K.S.A. 2011 Supp. 44-508(e).

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[4]

Claimant has the burden of proving that his work activities at Advanced and Performance were the prevailing factor causing his injuries and current need for medical treatment. K.S.A. 2011 Supp. 44-508(g) defines prevailing as:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

This Board Member finds that claimant proved by a preponderance of the evidence that his repetitive work activities at Advanced were the prevailing factor causing his injuries and current need for medical treatment. During the five years claimant worked for Advanced, claimant engaged in repetitive work duties required of an industrial painter. In April 2012, while working for Advanced, claimant began noticing symptoms of pain in his upper extremities. He then sought medical treatment after going to work for Performance. The only opinion in the record concerning prevailing factor is that of Dr. Stuckmeyer. He opined the repetitive nature of claimant's occupational duties while employed at Advanced was the prevailing factor causing claimant's injuries.

Conversely, this Board Member finds there is insufficient evidence to show that claimant's repetitive work duties at Performance were the prevailing factor causing his injuries or current need for medical treatment. Claimant began working for Performance on June 4, 2012. Claimant testified that when he left Advanced's employment on June 3, 2012, he was still having problems with his hands and sought medical treatment for his repetitive injuries on June 11, 2012. No medical evidence was presented that claimant's work activities at Performance were the prevailing factor causing his injuries or current need for medical treatment.

Advanced argues claimant failed to give timely notice of his injuries by repetitive trauma. Advanced did not raise the issue of timely notice at the preliminary hearing. Had

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[3] K.S.A. 2011 Supp. 44-501b(c).

[4] K.S.A. 2011 Supp. 44-508(h).

claimant been aware this was an issue, claimant could have presented additional evidence concerning notice. Nevertheless, this Board Member finds claimant gave timely notice of his injuries by repetitive trauma to Advanced. In April 2012, while working at Itan, claimant reported having problems with his arms to Mr. Emmett, which constitutes timely notice.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

CONCLUSION

1. Claimant had two dates of injury by repetitive trauma, the first on June 2, 2012, while employed by Advanced and the second on June 13, 2012, while employed by Performance.

2. Claimant proved by a preponderance of the evidence that his work activities at Advanced were the prevailing factor causing his injuries and current need for medical treatment.

3. Claimant gave timely notice of his injuries by repetitive trauma to Advanced.

4. Claimant failed to prove by a preponderance of the evidence that his work activities at Performance were the prevailing factor causing his injuries and current need for medical treatment.

WHEREFORE, the undersigned Board Member modifies the September 27, 2012, Order entered by ALJ Hursh to find that claimant's date of injury by repetitive trauma while employed at Advanced was June 2, 2012, and while employed at Performance was June 13, 2012. This Board Member finds that claimant gave timely notice of his June 2, 2012, injuries by repetitive trauma to Advanced. The remainder of ALJ Hursh's September 27, 2012, Order is affirmed.

IT IS SO ORDERED.

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[5] K.S.A. 2011 Supp. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).

Dated this ____ day of January, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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